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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MORRIS HARRIS,  
Plaintiff,  
vs.  
MICHAEL J. ASTRUE,  
Commissioner of Social Security,  
Defendant. } Case No. EDCV 11-0507-DTB  
} ORDER REVERSING DECISION OF  
} COMMISSIONER AND REMANDING  
} FOR FURTHER ADMINISTRATIVE  
} PROCEEDINGS

Plaintiff filed a Complaint on April 7, 2011, seeking review of the Commissioner's denial of his applications for Disability Insurance Benefits and Supplemental Security Income. In accordance with the Magistrate Judge's Case Management Order, the parties filed a Joint Stipulation ("Jt. Stip.") on January 9, 2012. Thus, this matter now is ready for decision.<sup>1</sup>

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<sup>1</sup> As the Court advised the parties in its Case Management Order, the decision in this case is being made on the basis of the pleadings, the Administrative Record (“AR”), and the Joint Stipulation filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § 405(g).

## **DISPUTED ISSUES**

1. Whether plaintiff's condition met or equaled Listing 1.04A and if not, whether the Administrative Law Judge ("ALJ") properly evaluated the claim; whether the ALJ properly characterized the medical evidence; and whether the ALJ properly evaluated the opinion of plaintiff's treating physician. (Jt. Stip. 5-15.)

2. Whether the ALJ properly evaluated plaintiff's credibility and subjective symptoms. (Jt. Stip. 15-22.)

## DISCUSSION

**I. Reversal is warranted with respect to the ALJ's failure to address whether plaintiff's condition met or equaled Listing 1.04A.**

While working as a janitor, plaintiff injured his lower back from repetitive lifting of desk furniture, trash, and other items. (AR 399.) An x-ray of plaintiff's lumbar spine showed that he had "severe degenerative disease at L5-S1." (AR 336.) In a sub-ground of Ground One, plaintiff claims that his condition meets or equals the requirements of Listing 1.04A (Disorders of the Spine) or in the alternative, that the ALJ improperly failed to explain his finding on this issue. (Jt. Stip. 6-7, 15.)

In 20 C.F.R. Part 404, Subpart P, Appendix 1, the Commissioner has set forth certain impairments that are presumed to be of sufficient severity to prevent the performance of work. See 20 C.F.R. §§ 404.1525(a), 416.925(a). At Step Three of the Commissioner's five-step disability analysis, the ALJ must determine whether a claimant's impairment or combination of impairments meets or equals a listed impairment. See Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). If a claimant has an impairment that meets or equals a listed impairment, disability is presumed and benefits are awarded. See 20 C.F.R. §§ 404.1520(d), 416.920(d); Barker v. Sec. of Health and Human Servs., 882 F.2d 1474, 1477 (9th Cir. 1989).

The claimant has the burden of proving disability, including disability based on the Listing of Impairments. See *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir.

1 1995); Vick v. Comm'r of Social Sec. Admin., 57 F. Supp. 2d 1077, 1087 (D. Or.  
 2 1999). The mere diagnosis of a listed condition does not establish that a claimant  
 3 "meets" the Listings. See Young v. Sullivan, 911 F.2d 180, 183-84 (9th Cir. 1990).  
 4 "For a claimant to show that his impairment matches a listing, it must meet all of the  
 5 specified medical criteria. An impairment that manifests only some of those criteria,  
 6 no matter how severely, does not qualify." Sullivan v. Zebley, 493 U.S. 521, 530,  
 7 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990) (emphasis in original); see also 20 C.F.R.  
 8 §§ 404.1525(d), 416.925(d).

9 Listing 1.04A (Disorders of the Spine) requires "[e]vidence of nerve root  
 10 compression characterized by neuro-anatomic distribution of pain, limitation of  
 11 motion of the spine, motor loss (atrophy with associated muscle weakness or muscle  
 12 weakness) accompanied by sensory or reflex loss and, if there is involvement of the  
 13 lower back, positive straight-leg raising test (sitting and supine)."

14 In his Step Three determination, the ALJ failed to mention Listing 1.04A but  
 15 instead stated a general conclusion that plaintiff "does not have an impairment or  
 16 combination of impairments that meets or medically equals one of the listed  
 17 impairments."<sup>2</sup> (AR 16.) The Commissioner argues that the ALJ's conclusion was  
 18 supported by the assessments of the state agency medical consultants, Drs. Cooper  
 19 and Williams. (Jt. Stip. 12.) The Court disagrees. Dr. Cooper's assessment does not  
 20 reference any listing nor provide any rationale for the ALJ's listings determination  
 21 (AR 337-41), and Dr. Williams is a psychiatrist who did not consider plaintiff's  
 22 lower-back impairment (AR 394). Nor does the ALJ's opinion itself contain  
 23 sufficient findings to support the determination. Accordingly, the ALJ's conclusory  
 24 listings determination is insufficient to support a finding of non-disability. See Lewis  
 25 v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001) ("An ALJ must evaluate the relevant

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27       <sup>2</sup> The ALJ did specifically find that plaintiff's mental impairment did not  
 28 meet or equal the requirements of Listing 12.04 (Affective Disorders), which plaintiff  
       does not challenge.

1 evidence before concluding that a claimant's impairments do not meet or equal a  
2 listed impairment. A boilerplate finding is insufficient to support a conclusion that  
3 a claimant's impairment does not do so.”)

4 However, the Court disagrees with plaintiff's contention that the ALJ's error  
5 entitles him to a finding of disability under Listing 1.04A and an award of benefits.  
6 (See Jt. Stip. 7.) Although it appears from the record that plaintiff's condition meets  
7 or equals some of the requirements of Listing 1.04A, plaintiff has not shown that his  
8 condition satisfies each of the criteria of the listing. Specifically, the Court is unable  
9 to find that plaintiff has shown that he has motor loss in the form of “atrophy with  
10 associated muscle weakness or muscle weakness” or shown that he has sensory or  
11 reflex loss within the meaning of the Commissioner's listings. Moreover, it is not  
12 clear from the record that plaintiff has met the durational requirement of the listing.  
13 See 66 Fed. Reg. 58010-01, 58018 (stating that Listing 1.04A generally requires a  
14 “longitudinal clinical record sufficient to assess the severity and expected duration”  
15 of the impairment).

16 Accordingly, remand for further proceedings is appropriate.

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18 **II. Reversal is not warranted with respect to the ALJ's characterization of**  
**the medical evidence or consideration of the treating physician's opinion.**

19 In the two remaining sub-grounds of Ground One, plaintiff claims that the  
20 ALJ's decision was erroneous or not supported by substantial evidence because he  
21 mischaracterized the medical evidence and because he failed to properly consider the  
22 opinion of plaintiff's treating physician, Dr. Quynam Nguyen. (Jt. Stip. 5-6, 7.) The  
23 Court disagrees with both contentions.

24 The ALJ did not mischaracterize the evidence of plaintiff's mental impairment  
25 in the three ways that plaintiff asserts. (Jt. Stip. 5-6.) First, plaintiff contends that the  
26 ALJ improperly found that plaintiff “had no history of psychiatric treatment or  
27 hospitalization” and “was not seeing a psychiatrist or counselor” because in fact  
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1 plaintiff did seek mental health treatment. (Jt. Stip. 5; AR 20.) What plaintiff fails  
2 to mention, however, is that the ALJ was merely quoting portions of the record in  
3 which examining physicians noted that plaintiff had no history of psychiatric  
4 treatment or hospitalization (AR 462) and was not seeing a psychiatrist or counselor  
5 (AR 372), presumably because that is what plaintiff told them. In any event, the ALJ  
6 did fully consider plaintiff's mental health treatment record. (AR 19-21.) Second,  
7 plaintiff contends that the ALJ mischaracterized plaintiff's mental impairment as a  
8 "depressive disorder" because he actually had a "major depressive disorder with  
9 psychotic features." (Jt. Stip. 5; AR 15.) However, plaintiff does not explain the  
10 significance of this distinction, especially in light of the fact that the ALJ fully  
11 accounted for plaintiff's mental impairment by determining that he should be limited  
12 to work involving simple, repetitive tasks. (AR 17.) Third, plaintiff contends that the  
13 ALJ incorrectly stated that no physician determined that plaintiff's mental  
14 impairments "were so severe that he was incapable of all work" because in fact  
15 evaluators at Tri City Mental Health Center ("Tri City") found that he had an  
16 "inability to meet role expectations at home, school, or employment." (Jt. Stip 5; AR  
17 21, 268, 355.) The record shows, however, that this finding was made by a mental  
18 health worker in order to determine plaintiff's eligibility for a treatment plan at Tri  
19 City. (AR 268, 355.) The ALJ was correct in concluding that no physician had found  
20 that plaintiff's mental impairments were so severe that he was incapable of all work,  
21 and in fact, the psychiatrist who treated plaintiff at Tri City reported that he was  
22 "better" and "doing well." (AR 278, 347.)

23       The ALJ also properly considered the opinion of Dr. Nguyen, a workers'  
24 compensation physician who treated plaintiff for his lower-back injury. (AR 424-52.)  
25 Specifically, the ALJ correctly noted that Dr. Nguyen treated plaintiff from  
26 September 2007 to May 2008, diagnosed him with impairments in his lumbar spine  
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1 and depression secondary to chronic pain, and concluded that plaintiff was  
 2 “temporarily totally disabled” through the workers’ compensation program.<sup>3</sup> (AR 17,  
 3 425, 428, 431, 437, 443, 446, 452.) To the extent that plaintiff argues that the  
 4 terminology Dr. Nguyen used in his workers’ compensation reports establish that  
 5 plaintiff was disabled under the Social Security Act (Jt. Stip. 7), the Court disagrees.  
 6 Terms of art used in worker’s compensation cases are not controlling in Social  
 7 Security cases. See Macri v. Chater, 93 F.3d 540, 543-43 (9th Cir. 1996); Desrosiers  
 8 v. Sec. of Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988). In any event,  
 9 Dr. Nguyen’s opinion that plaintiff was “temporarily totally disabled” for the period  
 10 of September 2007 to May 2008 does not, by itself, establish that plaintiff had a  
 11 disabling condition that had lasted, or was expected to last, for 12 continuous months  
 12 as required by the Social Security Act. See 20 C.F.R. §§ 404.1509, 416.909 (“Unless  
 13 your impairment is expected to result in death, it must have lasted or must be  
 14 expected to last for a continuous period of at least 12 months.”)

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16 **III. Reversal is not warranted with respect to the ALJ’s evaluation of**  
 17 **plaintiff’s credibility.**

18 In Ground Two, plaintiff claims that the ALJ failed to properly evaluate  
 19 plaintiff’s credibility and subjective symptoms. (Jt. Stip. 15.)

20 Where the claimant has produced objective medical evidence of an impairment  
 21 or impairments which could reasonably be expected to produce some degree of pain  
 22 and/or other symptoms, and the record is devoid of any affirmative evidence of  
 23 malingering, the ALJ may reject the claimant’s testimony regarding the severity of  
 24 the claimant’s pain and/or other symptoms only if the ALJ makes specific findings

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27 In workers’ compensation parlance, the term “temporarily totally  
 28 disabled” means that an individual is “totally incapacitated” and “unable to earn any  
 income during the period when he is recovering from the effects of the injury.” Booth  
v. Barnhart, 181 F. Supp. 2d 1099, 1103 n. 2 (C.D. Cal. 2002) (citations omitted).

stating clear and convincing reasons for doing so. See Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); see also Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). The ALJ “must identify what testimony is not credible and what evidence undermines the claimant’s complaints.” Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995) (as amended); see also Dodrill, 12 F.3d at 918. Further, a credibility finding must be “sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit [the] claimant’s testimony.” Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002).

Here, plaintiff testified that he cannot work because of chronic pain, mental problems, and back pain. (AR 62-63, 66.) The ALJ articulated legally sufficient reasons for declining to credit plaintiff’s statements regarding the extent of his pain and functional limitations.

First, the ALJ found that the evidence did not support plaintiff’s allegation of a disabling mental impairment because the Tri City records indicated that plaintiff was “doing well” or “better,” was able to concentrate, had no medication side effects, and had no problems with psychological features. (AR 19, 278, 483.) Moreover, the ALJ noted that no physician had concluded that plaintiff’s mental impairments were of such severe nature that he was incapable of all work. (AR 21.) Under Ninth Circuit jurisprudence, the ALJ could properly rely on such inconsistencies between plaintiff’s testimony and the objective medical evidence. See, e.g., Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) (ALJ may properly rely on lack of supporting medical evidence as a factor in credibility analysis); Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (ALJ may properly rely on absence of side effects to discredit plaintiff’s testimony); Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993) (ALJ may properly reject subjective allegations of pain where none of the doctors who examined plaintiff expressed the opinion that he was totally disabled).

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Second, the ALJ found that plaintiff's symptoms improved with treatment and conversely, when he was not taking his medications, his symptoms returned. (AR 19, 21, 479, 483.) An ALJ may rely on the effectiveness of treatment to find a plaintiff's testimony unpersuasive. See, e.g., Morgan v. Comm'r of Social Sec. Admin., 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may properly rely on report that plaintiff's mental symptoms improved with the use of medication); Odle v. Heckler, 707 F.2d 439, 440 (9th Cir. 1983) (noting that impairments that are controlled by treatment cannot be considered disabling).

The Court therefore finds and concludes that the reasons cited by the ALJ in support of his adverse credibility determination here were supported by substantial evidence in the record and were sufficiently specific to permit the Court to conclude that the ALJ did not arbitrarily discredit plaintiff's subjective testimony.

## **CONCLUSION AND ORDER**

The law is well established that the decision whether to remand for further proceedings or simply to award benefits is within the discretion of the Court. See, e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989) (as amended); Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted where additional administrative proceedings could remedy defects in the decision. See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984); Lewin, 654 F.2d at 635. Remand for the payment of benefits is appropriate where no useful purpose would be served by further administrative proceedings, Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); where the record has been fully developed, Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985) (per curiam) (as amended).

This is not an instance where no useful purpose would be served by further administrative proceedings or where the record has been fully developed. Rather, this

1 is an instance where additional administrative proceedings could remedy the defects  
2 in the ALJ's decision.

3 Pursuant to sentence four of 42 U.S.C. § 405(g), IT THEREFORE IS  
4 ORDERED that Judgment be entered reversing the decision of the Commissioner of  
5 Social Security and remanding this matter for further administrative proceedings.<sup>4</sup>

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7 DATED: March 30, 2012

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10 DAVID T. BRISTOW  
11 UNITED STATES MAGISTRATE JUDGE

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<sup>4</sup> It is not the Court's intent to limit the scope of the remand.